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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

WILLIAM CODY CARTER, an individual,
Plaintiff,

vs.

CITY OF CARLSBAD, a California Public
Entity, SCOTT MERITT, an individual and
in his official capacity, and DOES 1 though
10, inclusive,

Defendants.

CASE NO: 10-CV-1072-IEG (BLM)

**ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS’
MOTION FOR SUMMARY
JUDGMENT**

[Doc. No. 41]

Presently before the Court is Defendants’ motion for summary judgment. [Doc. No. 41.] For the reasons set forth below, the Court **GRANTS IN PART** and **DENIES IN PART** Defendants’ motion.

BACKGROUND

On Saturday, October 31, 2009, Plaintiff William Cody Carter (“Carter” or “Plaintiff”); his fiancée, Megan Damico (“Megan”); Megan’s sister, Jalyn Damico (“Jalyn”); Virginia Mula, and Judah Stauffer planned to spend the evening at the Coyote Bar & Grill in Carlsbad (the “Coyote”). Before going to the Coyote, the group met at Carter’s apartment, where Carter consumed approximately ten ounces of Jack Daniel’s whiskey mixed with approximately twenty ounces of cola. [Defs.’ MSJ, at 2; Carter Dep., at 10-12.]

1 Once they arrived at the Coyote, Carter was denied entrance to the bar. Still in the bar’s
2 parking lot, Carter complained loudly about not being allowed in and then left for his apartment,
3 accompanied by Megan, Jalyn, and Mula. [Megan Damico Dep., at 63:11-64:23, 66:1-67:24, 69:1-24;
4 Jalyn Damico Dep., at 53:2-9.] The group walked out of the parking lot along the western boundary of
5 Rotary Park, cut through the grass, and headed east on Carlsbad Village Drive, toward the railroad
6 tracks. [Pl.’s Opp’n, at 2; see Defs.’ MSJ, at 2.]

7 As it was Halloween, the members of the group were all dressed in costumes. Carter, a former
8 Marine, was dressed as a Marine and wore camouflage pants, a T-shirt, and a military “cover” on his
9 head. At the time of the incident, Carter was twenty-five years old, six feet four inches tall, and
10 weighed approximately 170 pounds. [Carter Decl., ¶ 1.]

11 Several independent witnesses observed the incident, though some of their recollections differ
12 slightly. As Carter, Megan, and Jalyn walked, they cried and yelled at each other, and it appeared they
13 were engaged in a verbal altercation. [See Sarah Maruccia Dep., at 15:4-12, 16:19-23, 17:6-14; Mark
14 Maruccia Dep., at 28:16-29:15; 32:15-33-1; Varela Dep., at 41:22-42:10, 82:14-20; Cangiamilla Dep.,
15 at 38:11-16, 45:5-22.] Megan and Jalyn repeatedly tried to calm Carter, but he responded each time by
16 yelling, flailing his arms about, and trying to pull away from his friends. [See Varela Dep., at 40:18-
17 24, 46:7-17, 82:14-20; Mark Maruccia Dep., at 28:16-29:15; 32:15-33-1; Cangiamilla Dep., at 11:1-6,
18 17:1-15, 24:14-24. But see Doyle Dep., at 47:15-18 (rather than trying to leave, Carter was following
19 his companions).] As he walked, Carter may have thrown the head cover he was wearing, a set of
20 keys, or other items to the ground and picked some of the items back up. [See Mark Maruccia Dep., at
21 39:21-41:14; Sarah Maruccia Dep., at 24:17-26:1, 31:3-23.]

22 At approximately 10:15 p.m., two officers of the Carlsbad Police Department—Officer Scott
23 Meritt (“Officer Meritt”) and Corporal Richard Galanos (“Cpl. R. Galanos”)—and one police
24 explorer—Explorer Brendan Galanos (“Explorer B. Galanos”), Cpl. R. Galanos’s son—were on foot
25 patrol, walking the 3000 block of Washington Street when “their attention was drawn to an argument
26 between an agitated male (plaintiff) and several others who were trying to calm him.” [Defs.’ MSJ, at
27 3; see Meritt Decl., ¶ 6; Cpl. R. Galanos Decl., ¶ 6.] Officer Meritt saw Carter yelling at a female and
28

1 grabbing her hands; it appeared he was attempting to take an item from her.¹ [Meritt Decl., ¶ 6.]
2 Meritt also observed Carter throw something into the grass area of Rotary Park. [Id.; see also Carter
3 Dep., at 48:5-49:15 (Carter discusses throwing his cellular telephone into the grass area of Rotary
4 Park).] Carter then retrieved the item and continued to yell in the direction of the female. [Meritt
5 Decl. ¶ 6.]

6 The officers did not see Carter strike anyone. They nonetheless grew concerned that he might
7 harm the female or continue to cause a disturbance, and they approached Carter. [Meritt Decl., ¶ 6;
8 Cpl. R. Galanos Decl., ¶ 6.]

9 When the officers approached, Carter, Megan, and Jalyn were still yelling at one another.
10 [Megan Damico Dep., at 79:19-20, 100:11-17, 128:14-129:5; Varela Dep., at 51:2-18 (noting that
11 Carter was yelling “at the top of his lungs”).] Megan heard one of the officers yell, “Stop.” [Megan
12 Damico Dep., at 71:13-25, 73:23-74:4, 77:12-25.] When the officers first came into her view, Megan
13 saw they were wearing police uniforms and badges and recognized them as police officers. [See id. at
14 76:23-77:11.] Megan told the officers that Carter had been drinking and she was taking him home.
15 [Id. 95:13-18, 126:8-16.]

16 There is some dispute as to exactly what occurred next. According to the officers, Cpl. R.
17 Galanos shined his flashlight on Carter and ordered him to sit on the curb. [Cpl. R. Galanos Decl., ¶ 7;
18 Officer Meritt Decl., ¶ 7; Explorer B. Galanos Dep., at 40:5-14.] Carter ignored the officers, and he,
19 Megan, and Jalyn continued yelling at one another. [See Officer Meritt Decl., ¶¶ 6-7; Cpl. R. Galanos
20 Decl., ¶¶ 6-7; Megan Damico Dep., at 98:1-100:25.] Plaintiff yelled, “Why?” several times. [Cpl. R.
21 Galanos Dep., 56:8-57:2.] Based on Plaintiff’s inability to follow instructions, his yelling, and his
22 agitated behavior, Officer Meritt and Cpl. R. Galanos concluded that Plaintiff was very drunk. [Meritt
23 Decl., ¶ 7; Cpl. R. Galanos Decl., ¶ 7.]

24 When Carter began to walk away from the officers, Cpl. R. Galanos yelled, “Hey, stupid!”
25 [Explorer B. Galanos Dep., at 34:11-13, 39:5-25; see Cpl. R. Galanos Dep., at 102:8-18.] At that
26 point, Carter turned to face the officers, cocked his right arm back, and took a “throwing stance.”

27 ¹ Although the officers’ declarations discuss observing Carter and one female, it appears that
28 Megan, Jalyn, and Mula were all present at the time of the incident. [See Megan Damico Dep., at
128:14-129:5.]

1 [Meritt Decl., ¶ 7. But see Doyle Dep., 33:22-34:24 (stating she did not see Carter “rear back like he
2 was going to throw something”); Cangiamilla Dep., at 28:21-29:4 (same).] Officer Meritt and Cpl. R.
3 Galanos observed an unidentified object in Carter’s right hand (later determined to be a set of keys).
4 [Meritt Decl., ¶ 7; Cpl. R. Galanos Decl., ¶¶ 7-8. But see also Explorer B. Galanos Dep., at 34:9-17
5 (stating he immediately recognized the object as keys); Meritt Dep., at 258:12-25 (stating he knew the
6 object was not a gun).]

7 Carter then yelled, “What?” and took an offensive fighting stance, “raising his shoulders and
8 enlarging his upper body while standing square with the officers.”² [Meritt Decl., ¶ 7; see Cpl. R.
9 Galanos Decl., ¶ 7; see also Varela Dep., at 51:19-53:1; Sarah Maruccia Dep., at 24:17-26:1; Mark
10 Maruccia Dep., at 42:1-3. But see Doyle Dep., 33:22-34:24 (stating Carter never took a fighting
11 stance); Cangiamilla Dep., at 28:21-29:4 (same).] Cpl. R. Galanos ordered Carter, at least two more
12 times, to sit on the curb, but Carter, about eight or ten feet away from the officers, did not comply and
13 continued screaming. [Cpl. R. Galanos Decl., ¶¶ 7-8; Meritt Decl., ¶¶ 7-8.] Meritt and Cpl. R.
14 Galanos drew their tasers and pointed them at Carter. Officer Meritt stated loudly, “Sit, or you will be
15 tased,” and Carter turned his attention toward Officer Meritt. [Cpl. R. Galanos Decl., ¶ 8; Meritt Decl.,
16 ¶ 8; see also Varela Dep., at 54:19-55:22.] Cpl. R. Galanos saw Carter clench his right fist, which
17 appeared to hold the unidentified object, and move toward Officer Meritt. [Cpl. R. Galanos Decl., ¶ 8;
18 see also Sara Maruccia Dep., 24:17-26:1, 31:3-23 Mark Maruccia Dep., 39:21-41:14. But see Meritt
19 Dep., at 139:10-18 (Meritt did not see Carter take steps toward him, but he was not watching Carter’s
20 feet).] Officer Meritt deployed his taser in “dart mode,” which shoots darts at a suspect from a
21 distance.

22 Megan Damico, Carter’s fiancée, recalls the incident somewhat differently.³ As their group
23 walked east on Carlsbad Village Drive, Megan heard an unidentified person yell, “Stop.” [Megan

24
25 ² Carter may also have removed items from his pockets and thrown them to the ground, though
26 none of the officers stated this occurred. [See Sara Maruccia Dep., 24:17-26:1, 31:3-23; Mark
27 Maruccia Dep., 39:21-41:14.]

28 ³ Carter himself has no recollection of the interaction with the officers or the tasing. The last
thing he remembers that evening is throwing his cellular telephone in the park after leaving the Coyote.
[Carter Dep., 43:18-25, 77:19-22.] Carter admits, however, that he tends to be loud when intoxicated,
due in part to “minimal” hearing loss incurred during his time in the military. [Id. at 77:23-78:2.]

1 Damico Dep., at 72:15-18.] Megan saw the officers as they ran toward the group from across the
2 street. The officers never verbally identified themselves as police, but Megan immediately recognized
3 them as officers because they were in uniform. Officer Meritt already had his hand on his taser as the
4 officers approached, and it remained there after the officers reached Carter's group. [See id. at 77:7-
5 11, 95:2-12.]

6 Megan attempted to explain that she was taking Carter home. Oblivious to the officers'
7 presence, Carter continued arguing with Jalyn. [Id. at 95:19-22.] Cpl. R. Galanos yelled, "Hey
8 Stupid." The officers continued speaking in the group's direction, but what they said was unclear
9 because several people spoke at once. [See id. at 98:1-25.] Carter turned around, raised his hands, and
10 yelled, "What?" or "Why?" twice, and Officer Meritt tased Carter from a distance of ten or fifteen feet.
11 [Cangiamilla Dep., at 30:14-16; Doyle Dep., at 21:11-14.] The entire incident, from the officers' first
12 interaction with the group to the tasing of Carter, took approximately fifty seconds. [See Explorer B.
13 Galanos Dep., at 58:5-11 (the time from the officer's initial radio call to dispatch to the call for
14 paramedics was approximately fifty seconds). But see Sergeant Koran Dep., at 100:7-25 (the initial
15 call-in time is not necessarily the time the officers first approached Carter).]

16 The remaining facts are undisputed. The taser darts contacted Carter's chest and abdomen. He
17 stood straight and fell backward, striking his head on the sidewalk and fracturing his skull. When the
18 taser's five-second cycle completed, Officer Meritt immediately requested paramedics. Carter spent
19 three nights in intensive care and four more under a neurosurgeon's care. Carter claims to suffer from
20 permanent hearing loss and balance problems as a result of the incident.

21 Carter's blood alcohol level was measured at the hospital. Approximately one hour after the
22 incident, at 11:15 p.m., his BAC measured .15. [Megan Damico Dep., at 42:20.] Carter was later
23 charged with violations of California Penal Code Sections 148(a)(1) (resisting, delaying, or obstructing
24 a police officer) and 647(f) (public intoxication). The charge under section 148(a) was later dropped,
25 but Carter pleaded guilty to public intoxication under section 647(f).

26 Carter's First Amended Complaint alleges six causes of action against Defendants Meritt and
27 the City of Carlsbad (the "City"): (1) excessive force under 42 U.S.C. § 1983, against Officer Meritt;
28 (2) failure to train under 42 U.S.C. § 1983, against the City; (3) failure to supervise under 42 U.S.C.
§ 1983, against the City; (4) battery under California State law, against Meritt and the City;

1 (5) negligence under California State law, against Meritt and the City; and (6) a violation of California
2 Civil Code section 52.1 against Meritt and the City. Defendants seek summary judgment on each of
3 Carter’s claims.

4 **LEGAL STANDARD**

5 “The court shall grant summary judgment if the movant shows that there is no genuine dispute
6 as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
7 56(a). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to
8 return a verdict for the non-moving party. Miller v. Glenn Miller Prod., Inc., 454 F.3d 975, 987 (9th
9 Cir. 2006).

10 In order to prevail, a party moving for summary judgment must show the absence of a genuine
11 issue of material fact with respect to an essential element of the nonmoving party’s claim, or to a
12 defense on which the nonmoving party will bear the burden of persuasion at trial. Nissan Fire &
13 Marine Ins. Co. v. Fritz Cos. Inc., 210 F.3d 1099, 1102 (9th Cir. 2000). When the nonmoving party
14 would bear the burden of proof at trial, the moving party may satisfy its burden on summary judgment
15 by simply pointing out to the Court an absence of evidence from the nonmoving party. Miller, 454
16 F.3d at 987. “The moving party need not disprove the other party’s case.” Id.

17 Once the movant has made that showing, the burden shifts to the opposing party to produce
18 “evidence that is significantly probative or more than ‘merely colorable’ that a genuine issue of
19 material fact exists for trial.” LVRC Holdings LLC v. Brekka, 581 F.3d 1127, 1137 (9th Cir. 2009)
20 (citing FTC v. Gill, 265 F.3d 944, 954 (9th Cir. 2001)); see also Miller, 454 F.3d at 988 (“[T]he non-
21 moving party must come forward with more than ‘the mere existence of a scintilla of evidence.’”)
22 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

23 The Court must review the record as a whole and draw all reasonable inferences in favor of the
24 nonmoving party. Hernandez v. Spacelabs Med. Inc., 343 F.3d 736, 738 (9th Cir. 2000). However,
25 unsupported conjecture or conclusory statements are insufficient to defeat summary judgment. Id.;
26 Surrell v. Cal. Water Serv. Co., 518 F.3d 1097, 1103 (9th Cir. 2008). “Thus, ‘[w]here the record taken
27 as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine
28 issue for trial.’” Miller, 454 F.3d at 988 (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio
Corp., 475 U.S. 574, 587 (1986)).

1 **DISCUSSION**

2 **I. 42 U.S.C. § 1983 Against Officer Meritt—Excessive Force**

3 Defendants move for summary judgment on Carter’s § 1983 claim against Meritt for excessive
4 force, arguing that Carter’s constitutional rights were not violated because Officer Meritt’s use of the
5 taser was reasonable under the circumstances. Defendants further argue that, even if Carter did suffer
6 a constitutional deprivation, Officer Meritt is entitled to qualified immunity because the state of the
7 law surrounding the appropriate use of tasers was sufficiently unclear that a reasonable officer would
8 not have known his use of the taser violated Carter’s constitutional rights.

9 In evaluating a police officer’s assertion of qualified immunity, the Court makes two
10 determinations. The Court decides, first, whether, “taking the facts in the light most favorable to the
11 non-moving party, the officer’s conduct violated a constitutional right; and second, if a violation
12 occurred, whether the right was clearly established in light of the specific context of the case.” Bryan
13 v. MacPherson, 630 F.3d 805, 823 (9th Cir. 2010) (internal quotation marks omitted). The Court has
14 discretion to address either prong of the qualified immunity analysis first. Pearson v. Callahan, 555
15 U.S. 223, 129 S. Ct. 808, 818 (2009).

16 **A. Whether Carter Suffered a Constitutional Deprivation**

17 The Court examines allegations of excessive force under the Fourth Amendment’s prohibition
18 on unreasonable seizures. Bryan, 630 F.3d at 823. The Court inquires “whether the officers’ actions
19 are ‘objectively reasonable’ in light of the facts and circumstances confronting them.” Id. (quoting
20 Graham v. Connor, 490 U.S. 386, 397 (1989)). The Court “must balance the nature and quality of the
21 intrusion on the individual’s Fourth Amendment interests against the countervailing governmental
22 interests at stake.” Id. (internal quotation marks omitted); see also Deorle v. Rutherford, 272 F.3d
23 1272, 1280 (9th Cir. 2001). “Stated another way, [the Court] must ‘balance the amount of force
24 applied against the need for that force.’” Bryan, 630 F.3d at 823-24 (quoting Meredith v. Erath, 342
25 F.3d 1057, 1061 (9th Cir. 2003)). “This balance must be ‘judged from the perspective of a reasonable
26 officer on the scene, rather than with the 20/20 vision of hindsight.’” Boyd v. Benton Cnty, 374 F.3d
27 773, 779 (9th Cir. 2004) (quoting Graham, 490 U.S. at 396). “The need for such balancing means that
28 ‘summary judgment . . . in excessive force cases should be granted sparingly.’” Id. (quoting Santos v.

1 Gates, 287 F.3d 846 853 (9th Cir. 2002)); see Chew v. Gates, 27 F.3d 1432, 1440 (9th Cir. 1994)
2 (“Because questions of reasonableness are not well-suited to precise legal determination, the propriety
3 of a particular use of force is generally an issue for the jury.”).

4 **1. Nature and Quality of the Intrusion—“Intermediate Force”**

5 Officer Meritt shot Plaintiff from between eight and fifteen feet away with an X26 Taser
6 deployed in “dart mode.” In Bryan v. MacPherson, the Ninth Circuit recently described the nature of
7 force imposed by using a taser in dart mode:

8 The X26 uses compressed nitrogen to propel a pair of “probes”—aluminum darts
9 tipped with stainless steel barbs connected to the X26 by insulated wires—toward the
10 target at a rate of over 160 feet per second. Upon striking a person, the X26 delivers a
11 1200 volt, low ampere electrical charge through the wires and probes and into his
12 muscles. The impact is as powerful as it is swift. The electrical impulse instantly
13 overrides the victim’s central nervous system, paralyzing the muscles throughout the
14 body, rendering the target limp and helpless. The tasered person also experiences an
15 excruciating pain that radiates throughout the body.

16 630 F.3d at 824 (internal footnotes and citations omitted). This constitutes an “intermediate,
17 significant level of force that must be justified by the governmental interest involved.” Id. at 826.

18 **2. Governmental Interest in the Use of Force**

19 The Court considers three core factors to evaluate the government’s interest in the use of force:
20 (1) the severity of the crime at issue, (2) whether the suspect posed an immediate threat to the safety of
21 the officers or others, and (3) whether the suspect was actively resisting arrest or attempting to evade
22 arrest by flight. Id. (discussing Graham, 490 at 396). But this list is not exhaustive; the Court must
23 “examine the totality of the circumstances and consider ‘whatever specific factors may be appropriate
24 in a particular case, whether or not listed in Graham.’” Id. (quoting Franklin v. Foxworth, 31 F.3d 873,
25 876 (9th Cir. 1994)). Viewing the facts in the light most favorable to Carter, as the Court must at this
26 stage in the proceedings, see id. at 830, Carter suffered a constitutional deprivation.

27 **i. Whether Carter Posed a Threat to the Officers or Others**

28 The most important factor is whether the suspect posed an immediate threat to the safety of the
officers or others. Smith v. City of Hemet, 394 F.3d 689, 702 (9th Cir. 2005) (en banc) (quoting
Chew, 27 F.3d at 1441). However, “[a] desire to resolve quickly a potentially dangerous situation is

1 not the type of governmental interest that, standing alone, justifies the use of force that may cause
2 serious injury.” Bryan, 630 F.3d at 826 (quoting Deorle, 272 F.3d at 1281).

3 Defendants, relying almost entirely on the officers’ version of the facts, argue that Officer
4 Meritt reasonably believed Carter posed a danger to the officers and to Carter’s companions.
5 Defendants claim: Carter was drunk; Carter roughly snatched items from and pushed one of his
6 companions; Carter yelled threateningly at his companions and at the officers; Carter held an unknown
7 item in his hands and made motions suggesting he would throw the item at the officers; Carter adopted
8 an aggressive, fighting posture and made threatening movements toward the officers⁴; and Carter could
9 have quickly closed the eight to ten feet separating him from the officers. Moreover, throughout the
10 interaction, Carter ignored the officers’ repeated instructions to sit down. [See Defs.’ MSJ, at 8-9.]

11 Carter paints a very different picture. The officers approached the group with little warning,
12 yelling only “Stop” from across the street. Far from afraid that Carter would harm them, one of his
13 companions attempted to inform the officers that Carter was intoxicated, but that they were taking him
14 home. While the officers may have continued speaking during the encounter, no one other than the
15 officers claims to have heard any instructions or warnings to Carter that he may be tased. Carter had
16 keys in his hand, which Explorer B. Galanos immediately recognized as keys. Officer Meritt could not
17 immediately identify the object in Carter’s hand as keys, but he did recognize that Carter was not
18 holding a gun. Carter yelled, but he was not aggressive or belligerent toward the officers.
19 Furthermore, Carter was ten to fifteen feet away from the officers when Officer Meritt tased him. [See
20 Pl.’s Opp’n, at 9.]

21 Genuine issues of fact regarding Carter’s behavior preclude summary judgment on the
22 reasonableness of Officer Meritt’s use of force. Viewing the facts in the light most favorable to Carter,
23 this case is similar to Bryan: Carter acted bizarrely, but his “erratic, but nonviolent, behavior” did not
24 create a potential threat. See Bryan, 630 F.3d at 827. Moreover, as noted in Bryan, the presence of

25
26 ⁴ Despite remembering nothing about the incident, Carter says that, rather than a
27 confrontational stance, his posturing before the officers—“puffing his chest,” bringing his “hands to
28 [his] sides, and star[ing] straight ahead”—may have been his going into the “the position of Attention,”
as he was trained to do before superior officers in the Marine Corp. [See Carter Decl., ¶¶ 4-6.]
Carter’s subjective intention, however, is irrelevant; the Court must assess whether and to what extent
a reasonable officer might have interpreted Carter’s posturing and other actions as confrontational.

1 other officers “change[s] the tactical calculus confronting [an officer], likely opening up additional
2 ways to resolve the situation without the need for an intermediate level of force.” Id. at 831. Thus,
3 this, the most important factor, does not justify Officer Meritt’s use of intermediate force.

4 **ii. The Severity of the Crime at Issue**

5 The officers detained Carter on suspicion that he had violated California Penal Code Sections
6 148(a)(1) (resisting, delaying, or obstructing a police officer) and 647(f) (public intoxication), both
7 misdemeanors. Misdemeanors are relatively minor and generally will not support the use of
8 intermediate force. Id. at 828-29 & n.12. Neither of the offenses for which Carter was cited is
9 inherently dangerous or violent. Thus, this factor militates against finding Officer Meritt’s use of
10 intermediate force reasonable. See id.

11 **iii. Whether Carter Attempted to Flee or Actively Resisted**

12 Defendants have not alleged that Carter attempted to flee. To the extent it can be said he
13 “resisted” the officers at all, Carter offered only “passive” resistance. While resistance “should not be
14 understood as a binary state,” the Ninth Circuit has “drawn a distinction between passive and active
15 resistance.” Bryan, 630 F.3d at 829-30. Where a suspect’s resistance is not particularly bellicose, it
16 “provide[s] little support for a use of significant force.” Id. at 830.

17 For example, the plaintiff in Bryan exited his vehicle, shouted gibberish, and repeatedly hit
18 himself in the quadriceps during a routine traffic stop. The court characterized the plaintiff’s behavior
19 as “bizarre,” but “a far cry from actively struggling with an officer attempting to restrain and arrest an
20 individual.” Id. Similarly, the Ninth Circuit has classified as passive resistance a suspect continuously
21 ignoring an officer’s commands to remove his hands from his pockets and not to re-enter his home,
22 even where the plaintiff “physically resisted . . . for only a brief period of time.” Smith v. City of
23 Hemet, 394 F.3d 689, 703 (9th Cir. 2005) (en banc); see also Forrester v. City of San Diego, 25 F.2d
24 804, 805 (9th Cir. 1994) (a protestor’s “remaining seated, refusing to move, and refusing to bear
25 weight” despite contrary orders from police constituted “passive resistance”).

26 Viewing the facts of this case in Carter’s favor, the officers yelled, “Stop,” as they approached
27 his group from across the street. Once they reached the group, Cpl. R. Galanos yelled, “Hey Stupid.”
28 Carter turned around, raised his hands, and yelled, “What?” or “Why?” twice. Without providing clear

1 additional instructions, Officer Meritt tased Carter. [See Megan Damico Dep., at 72:15-18, 95:2-12;
2 Varela Dep., at 54:9-22, 75:18-25 (stating that he could not hear whether the officers gave any
3 additional instructions prior to tasing Plaintiff).] The entire interaction between the officers and Carter
4 lasted approximately fifty seconds before Carter was tased. [See Explorer B. Galanos Dep., at 58:5-
5 11.]

6 Under this version of the facts, the officers gave one command—“Stop”—and yelled, “Hey
7 Stupid” before Officer Meritt tased Carter. Carter may have disregarded the order to stop, but he did
8 not receive, and thus did not ignore, other commands. Carter’s raising his arms and yelling “What?” or
9 “Why?” at the officers, while perhaps odd, constitutes at most passive resistance, and it likely does not
10 constitute resistance at all.⁵ See Bryan, 630 at 829-30. Moreover, the entire encounter appears to have
11 taken approximately fifty seconds. Even if he did receive additional commands, it is unclear whether
12 Carter had enough time to comply before he was tased. See Garcia v. City of Imperial, No. 08cv2357,
13 2010 WL 3834020, at *10 (S.D. Cal. Sept.28, 2010) (“Giving a warning without sufficient time to
14 comply is tantamount to not giving a warning at all.”). Therefore, this factor also weighs against
15 finding Defendant Meritt’s use of the taser reasonable.

16 **3. Balancing the Competing Interests**

17 Taking the facts in the light most favorable to Carter, a reasonable fact-finder could find that
18 the officers had only a minimal reason to use force against him. This does not justify the use of an
19 intermediate level of force, such as a taser in dart mode. Where facts are disputed, their resolution and
20 related determinations of credibility are “manifestly in the province of a jury.” Wall v. Cnty. of

21 _____
22 ⁵ Carter also argues that, because they suspected he was drunk, the officers should have treated
23 him as an emotionally disturbed suspect. [Pl.’s Opp’n, at 12-13.] Although the Ninth Circuit has
24 “refused to establish two tracks of excessive force analysis, one for the mentally ill and one for serious
25 criminals,” a “mentally ill individual is in need of a doctor, not a jail cell, and in the usual case—where
26 such an individual is neither a threat to himself nor to anyone else—the government’s interest in
27 deploying force to detain him is not as substantial as its interest in deploying that force to apprehend a
28 dangerous criminal.” Bryan, 630 F.3d at 829; see also Deorle, 272 F.3d at 1282-83 (noting that the
“problems posed by, and thus the tactics to be deployed against,” mentally ill subjects are “ordinarily
different” from issues surrounding police interactions with subjects who do not suffer mental illness).
However, Carter has not offered, and the Court is unaware of, any legal authority or policy
consideration to support his contention that a voluntarily intoxicated subject should be treated like a
mentally ill subject.

1 Orange, 364 F.3d 1107, 1110 (9th Cir. 2004) (quoting Santos, 287 F.3d at 852). Accordingly, the
2 Court **DENIES** Defendants’ motion for summary judgment that Officer Meritt’ did not use excessive
3 force against Carter.

4 **B. Whether Officer Meritt Is Entitled to Qualified Immunity**

5 Qualified immunity shields government officials “from liability for civil damages insofar as
6 their conduct does not violate clearly established statutory or constitutional rights of which a
7 reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Even where
8 an officer has violated a citizen’s constitutional rights, the officer is entitled to qualified immunity if
9 his “use force was ‘premised on a *reasonable* belief that such force was lawful.’” Bryan, 630 F.3d at
10 832 (quoting Deorle, 272 F.3d at 1285) (emphasis in original). Qualified immunity insulates from
11 liability “all but the plainly incompetent or those who knowingly violate the law.” Malley v. Briggs,
12 475 U.S. 335, 341 (1986); *see also* Pearson, 129 S. Ct. at 818 (noting that qualified immunity protects
13 officials’ reasonable mistakes, whether “a mistake of law, a mistake of fact, or a mistake based on
14 mixed questions of law and fact”). To decide whether Officer Meritt reasonably could have believed
15 tasing Carter would not violate his constitutional rights, the Court must examine the state of the law at
16 the time of the incident. Carter bears the burden of showing that the right in question was clearly
17 established at that time. Robinson v. York, 556 F.3d 817, 826 (9th Cir. 2009).

18 Before the Ninth Circuit decided Bryan, it was unclear whether the use of a taser in dart mode
19 constituted an intermediate level of force or something less. Because this incident occurred before the
20 Ninth Circuit’s first opinion in Bryan,⁶ the Court cannot conclude that, at the time the incident giving
21

22 ⁶ Bryan’s procedural history at the Ninth Circuit has been a bit complicated. In total, the Ninth
23 Circuit issued three separate Bryan opinions: 590 F.3d 767 (9th Cir. Dec. 28, 2009) [hereinafter “Bryan
24 I”], 608 F.3d 614 (9th Cir. June 18, 2010) [hereinafter “Bryan II”], 630 F.3d 805 (9th Cir. Nov. 30,
25 2010) [hereinafter Bryan or Bryan III]. Bryan I and II have both been withdrawn and superseded by
26 Bryan III.

27 In all three decisions, the Ninth Circuit agreed with the district court that the use of the taser in
28 that case was excessive. The decisions go back and forth, however, on the second prong of the
qualified immunity inquiry—whether the law was clearly established at the time of the incident.
Ultimately, Bryan III held that the defendant officer was entitled to qualified immunity because, prior
to Bryan I, it was not clearly established that the use of a taser in dart mode constitutes an intermediate
use of force.

1 rise to this action occurred, a reasonable officer in the situation confronting Officer Meritt would have
2 known that using a taser in dart mode was unlawful. Thus, Officer Meritt is entitled to qualified
3 immunity. The Court therefore **GRANTS** summary judgment on Carter’s claim of excessive force
4 under 42 U.S.C. § 1983.

5 **II. 42 U.S.C. § 1983 Claims Against the City—Failure to Supervise and Failure to Train**

6 Carter’s FAC makes two arguments against the City for Meritt’s alleged use of excessive
7 force—failure to train and failure to supervise. [FAC, ¶¶ 26-30 (failure to train), ¶¶ 31-36 (failure to
8 supervise).] Defendants move for summary judgment on both.

9 **A. Failure to Supervise**

10 Carter’s Opposition makes no arguments in defense of his failure to supervise claim. At oral
11 argument, Carter’s counsel confirmed that Carter does not oppose summary judgment on this claim.
12 Accordingly, the Court **GRANTS** Defendants’ motion for summary judgment on Carter’s claim for
13 failure to supervise under § 1983.

14 **B. Failure to Train**

15 Carter’s failure to train claim rests on two theories: First, contrary to its stated policy, the City
16 customarily issued tasers to officers who were not trained in the appropriate use of tasers. Second, the
17 Internal Affairs Division of the Carlsbad Police Department had a practice of exonerating officers
18 accused of excessive force without sufficient analysis of the allegations and evidence. As a result,
19 Carter argues, the City failed to identify the need for training within the Police Department.

20 Municipalities are “persons” under § 1983 and may therefore face liability for constitutional
21 deprivations. See Monell v. New York City Dep’t of Social Servs., 436 U.S. 658, 691 (1978); Long v.
22 Cnty. of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006). Where, as here, an individual officer is
23 entitled to qualified immunity even though a constitutional violation occurred, the officer’s immunity
24 will not protect a municipality from liability under § 1983. Burke v. City of Alameda, 586 F.3d 725,
25 734 (9th Cir. 2009) (“[L]ocal governments are not entitled to the qualified-immunity defense”
26 (citing Hervey v. Estes, 65 F.3d 784, 791 (9th Cir. 1995))). But municipalities may not be sued under a

27 The incident that gave rise to this action occurred on October 31, 2009—nearly two months
28 before the Ninth Circuit issued Bryan I.

1 theory of *respondeat superior* for injuries inflicted solely by their employees. Connick v. Thompson,
2 ---U.S.---, 131 S. Ct. 1350, 1359 (2011); Anderson v. Warner, 451 F.3d 1063, 1070 (9th Cir. 2006).
3 Rather, a municipality can face § 1983 liability only where “‘action pursuant to official municipal
4 policy’ caused [the plaintiff’s] injury.” Connick, 131 S. Ct. at 1359 (quoting Monell, 436 U.S. at 691);
5 see Blankenhorn v. City of Orange, 485 F.3d 463, 484 (9th Cir. 2007). “Official municipal policy
6 includes the decisions of a government’s lawmakers, the acts of its policymaking officials, and
7 practices so persistent and widespread as to practically have the force of law.” Connick, 131 S. Ct. at
8 1359 (citations omitted); see also Young v. City of Visalia, 687 F. Supp. 2d 1141, 1147 (E.D. Cal.
9 2009) (for the purposes of municipal liability, “a custom is a widespread and longstanding practice that
10 ‘constitutes the standard operating procedure of the local government entity’” (quoting Trevino v.
11 Gates, 99 F.3d 911, 918 (9th Cir. 1996))). “These are ‘action[s] for which the municipality is actually
12 responsible.’” Connick, 131 S. Ct. at 1359 (quoting Pembaur v. Cincinnati, 475 U.S. 469, 479-80
13 (1986)).

14 “In limited circumstances, a local government’s decision not to train certain employees about
15 their legal duty to avoid violating citizens’ rights may rise to the level of an official government policy
16 for purposes of § 1983.” Connick, 131 S. Ct. at 1359; see Long, 442 F.3d 1185-86 (a policy of
17 “inaction” or “omission,” such as a failure to train, can result in municipal liability). For the City to
18 face liability under § 1983 for a failure to train its police officers, Carter must show: “(1) he was
19 deprived of a constitutional right; (2) the City had a training policy that amounts to deliberate
20 indifference to the constitutional rights of the persons with whom its police officers are likely to come
21 into contact; and (3) his constitutional injury would have been avoided had the City properly trained
22 those officers.” Blankenhorn, 485 F.3d at 484 (internal quotation marks and alterations omitted); see
23 also Connick, 131 S. Ct. at 1359-60 (a municipality’s policy of not training its employees is only
24 actionable where it “amount[s] to ‘deliberate indifference to the rights of persons with whom the
25 [untrained employees] come into contact’” (quoting Canton, 489 U.S. at 388)).

26 **1. Officer Training and the Issuance of Tasers**

27 As discussed above, a material issue of fact exists as to whether Carter suffered a constitutional
28 deprivation. Thus, Carter has satisfied the first prong for establishing municipal liability.

1 Regarding the second prong, Carter claims the City had a practice of distributing X26 tasers to
2 police officers, including Officer Meritt, without training them on the appropriate use of tasers. This
3 raises two issues: whether this was, in fact, the City’s policy, and, if so, whether such a policy satisfies
4 the “deliberate indifference” standard.

5 Viewing the evidence in the light most favorable to Carter, a material factual dispute exists as
6 to whether the City customarily issued tasers to untrained officers. The City’s official policy states
7 that no officer may be issued a taser unless he has been trained to use it properly. [Pl.’s Opp’n, Ex. 29
8 (Carlsbad Police Department’s policy 309.2, stating that “[p]ersonnel who have completed department
9 approved training may be issued a TASER for use during their current assignment”); see also
10 Meadows Dep., at 57:24-58:1 (“[N]o tasers are issued until after [officers] have had the training.”).]
11 However, the City has failed to provide evidence that any but a small minority of its officers were
12 actually trained to use the X26 taser: though it is standard issue equipment, the City’s records list only
13 fifteen of its 115 officers as being trained and certified to use the X26 taser. [See Pl.’s Opp’n, Ex. 17
14 (records of taser training and distribution); Meadows Dep., at 54:23-55:7, 69:21-23.] Indeed, other
15 than records indicating that fifteen officers received training, the City has not offered any documentary
16 evidence that the training course on the X26 taser existed at all—no syllabi, no registration or sign-in
17 sheets, and no course-related examinations. [But see Boyd Dep., at 5:23-8:17 (stating he conducted at
18 least one training about the X26 taser in 2006); Meritt Dep., at 159:6-163:19 (stating he attended a
19 training on the X26 taser in 2006); Cpl. R. Galanos Dep., 127:1-129:7 (stating he attended a training
20 on the X26 taser in 2006).] Moreover, the relevant training purportedly took place during an eighteen-
21 month period of time when the position of Training Coordinator for the Carlsbad Police Department
22 remained vacant and a sergeant was supposed to conduct officer trainings in addition to his regular
23 duties. [See Meadows Dep., at 16:5-17:15.] The foregoing is sufficient to establish a genuine issue of
24 fact as to whether the City’s standard procedure was to issue tasers to untrained officers. See Ulrich v.
25 City and Cnty. of San Francisco, 308 F.3d 968, 984-985 (9th Cir. 2002) (“Showing a ‘longstanding
26 practice or custom which constitutes the “standard operating procedure” of the local government
27 entity’ is one way to establish municipal liability.” (quoting Jett v. Dallas Indep. Sch. Dist., 491 U.S.
28 701, 737 (1989)).

1 A practice of issuing tasers to untrained officers would demonstrate a “deliberate indifference
2 to the rights of persons with whom the [City’s police officers] come into contact.” Canton, 489 U.S. at
3 388. Deliberate indifference requires a “‘conscious’ or ‘deliberate’ choice by the City to risk a ‘likely’
4 violation of constitutional rights.” Price v. Sery, 513 F.3d 962, 973 (9th Cir. 2008) (citing Canton, 489
5 U.S. at 389). Failure to train demonstrates deliberate indifference when “in light of the duties assigned
6 to specific officers or employees the need for more or different training is so obvious, and the
7 inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city
8 can reasonably be said to have been deliberately indifferent to the need.” Canton, 489 U.S. at 390; see
9 also Connick, 131 S. Ct. at 1360 (“[W]hen city policymakers are on actual or constructive notice that a
10 particular omission in their training program causes city employees to violate citizens’ constitutional
11 rights, the city may be deemed deliberately indifferent if the policymakers choose to retain that
12 program.” citing Bd. of Comm’rs of Bryan City. v. Brown, 520 U.S. 397, 410 (1997)).

13 The alleged practice in this case mirrors the paradigmatic example provided by the Supreme
14 Court in Canton of a practice so obviously likely to result in constitutional deprivations that the
15 municipality’s policymakers must have been aware of, and deliberately indifferent to, that risk:

16 [C]ity policymakers know to a moral certainty that their police officers will be
17 required to arrest fleeing [and potentially combative suspects]. The city has
18 armed its officers with [tasers], in part to allow them to accomplish this task.
19 Thus, the need to train officers in the constitutional limitations on the use
20 of . . . force can be said to be “so obvious,” that failure to do so could properly be
21 characterized as “deliberate indifference” to constitutional rights. . . .

22 Canton, 489 U.S. at 390 n.10. The City provides tasers to its officers for the very purpose of inflicting
23 force upon criminal suspects when necessary to effect an arrest. To issue weapons without educating
24 officers of the constitutional limitations on the use of force creates an obvious risk that the City’s
25 officers will violate people’s constitutional rights, and therefore satisfies the deliberate indifference
26 standard. Id.; see also Chew, 27 F.3d at 1445 (finding that a failure to train officers to properly handle
27 police dogs provides a sufficient basis for municipal liability). Accordingly, Carter has satisfied the
28 second prong for establishing municipal liability under § 1983.

To establish municipal liability, however, Carter must also show that the City’s practice caused
his constitutional deprivation. Anderson v. Warner, 451 F.3d 1063, 1070 (9th Cir. 2006) (“There also
must be a ‘direct causal link’ between the policy or custom and the injury” (quoting McDade v.

1 West, 223 F.3d 1135, 1141 (9th Cir. 2000)); see Blankenhorn, 485 F.3d at 484 (a plaintiff must show
2 proper training would have prevented his injury). For Carter to show the City’s alleged practice of
3 issuing tasers to untrained officers caused his injury, he must establish that the officer who tased him
4 was untrained. Carter’s claim fails on this third prong.

5 Carter argues that, as a result of the City’s practice related to the issuance of tasers, Officer
6 Meritt was not trained prior to the City issuing him an X26 taser. Had Meritt been properly trained,
7 the argument goes, he would not have tased Carter.

8 Like the majority of officers employed by the Carlsbad Police Department, Officer Meritt was
9 issued an X26 taser, but Defendants cannot provide documentary evidence that Meritt was ever trained
10 to use it appropriately. The City has provided documentary records showing that Officer Meritt was
11 trained to use a taser in 2004—more than five years before and with an older model taser than the one
12 used in the incident with Carter.⁷ [See Pl.’s Ex. 19 (list of City police officers who were trained on the
13 M26 model taser); Meritt Dep., 161:4-17.] Based on this, Carter argues that a genuine issue of fact
14 exists as to whether Officer Meritt was in fact trained on the appropriate use of tasers before he tased
15 Carter.

16 However, Officer Meritt testified repeatedly during his deposition that he attended a training
17 that addressed the policies for use of tasers, as well as technical issues related to the X26 model, in
18 2006. [Meritt Dep., at 159:6-163:19; see also Meritt Decl., ¶ 5.] He also testified that, to the best of
19 his recollection, the taser training was part of a broader training on “arrest and control,” which Meritt’s
20 training records indicate he attended in March 2006. [Meritt Dep., at 159:6-163:19; Pl.’s Ex. 23
21 (Meritt’s Individual Training Activity Log).] Moreover, Sergeant Christopher Boyd, who conducted
22 trainings for the City’s police officers on the use of tasers, testified at his deposition that he had a
23 “general recollection of having trained [Officer Meritt] on the X26 [taser] . . . sometime in 2006.”
24 [Boyd Dep., at 5:23-8:17.]

25
26 ⁷ The City argues its equipment-distribution records indicate Meritt was issued a taser in 2007,
27 and therefore, because of the City’s written policy that an officer must receive training before being
28 issued a taser, the Court should infer from those records that Officer Meritt was also trained on taser
use in 2007. As discussed above, however, there is a genuine dispute of fact as to whether the City’s
actual practice matched its written policy.

1 Thus, the evidence supports Officer Meritt’s argument that he was in fact trained on the X26
2 taser, despite the lack of specific documentation on this issue. Carter has thus failed to establish “‘that
3 [his] injury would have been avoided’ had the City implemented proper policies.” Long, 442 F.3d at
4 1190 (quoting Gibson v. Cnty. of Washoe, Nev., 290 F.3d 1175, 1196 (9th Cir. 2002)). Accordingly,
5 to the extent Carter’s failure to train claim is based on the City’s alleged practice of issuing tasers to
6 untrained officers, Defendants’ motion for summary judgment is **GRANTED**.

7 **2. Internal Affairs Investigations**

8 Carter’s second theory for his § 1983 claim against the City relates to its handling of internal
9 affairs investigations into allegations of excessive force by police officers. One of the purposes of the
10 City’s internal affairs investigations is to reveal areas where more training is needed. [See Koran Dep.,
11 at 26:2-6.] But, Carter argues, instead of providing objective inquiry and analysis, the City’s internal
12 affairs investigations simply serve to exonerate the City’s police officers of any alleged wrongdoing.
13 As a result, the investigations fail to identify training needs in the City’s police department. [Pl.’s
14 Opp’n, at 20-21 (arguing the City has a “custom of whitewashing [internal affairs] investigations and
15 reports).]

16 More specifically, Carter points to two investigations into allegations of excessive force against
17 Officer Meritt: one related to an incident in 2008, in which Officer Meritt used force, including his
18 taser, to subdue a fleeing suspect; the second being the investigation into the incident giving rise to this
19 action. Carter argues both investigations inadequately dealt with discrepancies between various
20 witnesses’ statements and failed to identify Officer Meritt’s need for additional training—especially
21 related to taser use. This is insufficient to establish a municipal policy or custom for the purpose of a
22 § 1983 claim.

23 A municipality may only face liability under § 1983 when “its deliberate policy caused the
24 constitutional violation alleged.” Blankenhorn, 485 F.3d at 484. Carter points to just two internal
25 affairs investigations, both of which focused on Officer Meritt.⁸ However, even assuming the

26 ⁸ Attempting to get around this failing, Plaintiff stretches the deposition testimony of Sergeant
27 Greg Koran to suggest a broad practice of exonerating officers accused of excessive force. Since 2009,
28 Koran has been the Supervisor of the Professional Standards Unit, and he investigated Officer Meritt’s
conduct in the incident giving rise to this case. Koran testified that he was unsure of how many
excessive force cases he had investigated, the results of all of his investigations, the number of

1 investigations failed to identify deficiencies in Officer Meritt’s training, “evidence of the failure to
2 train a single officer is insufficient to establish a municipality’s deliberate policy.” Blankenhorn, 485
3 F.3d at 484. Furthermore, “[I]ability for improper custom may not be predicated on isolated or
4 sporadic incidents; it must be founded upon practices of sufficient duration, frequency and consistency
5 that the conduct has become a traditional method of carrying out policy.” Trevino, 99 F.3d at 918.

6 Carter has simply not provided evidence of a City practice of “whitewashing” internal affairs
7 investigations and reports. Moreover, even assuming this was a City policy, Carter has not provided
8 evidence demonstrating such a practice would satisfy the deliberate indifference standard or caused his
9 injuries. See Connick, 131 S. Ct. at 1360 (“A pattern of similar constitutional violations by untrained
10 employees is ‘ordinarily necessary’ to demonstrate deliberate indifference for purposes of failure to
11 train” (quoting Bryan City, 520 U.S. at 409)); Canton, 489 U.S. at 385 (requiring a “direct causal link
12 between a municipal policy or custom and the alleged constitutional deprivation”); see also Brown,
13 520 U.S. at 407-08 (the identified deficiency in the training program must be the “moving force”
14 behind the alleged constitutional injury). Thus, Defendants’ motion for summary judgment against
15 this claim is **GRANTED**.

16 **III. State Law Claims Against Officer Meritt and the City—Battery, Negligence, and a 17 Violation of California Civil Code § 52.1**

18 Defendants also move for summary judgment on Carter’s claims under state law: battery,
19 negligence, and California Civil Code § 52.1. The question of whether Officer Meritt used excessive
20 force underpins each of those claims. [See FAC ¶¶ 37-53.]

21 **A. Battery**

22 Battery claims brought under California law are analyzed under the reasonableness standard
23 used to evaluate Fourth Amendment claims. Atkinson v. Cnty. of Tulare, ---F. Supp. 2d---, 2011 WL

24 excessive force cases investigated by the Professional Standards Unit since he joined it, or the number
25 of cases in which an officer investigated for excessive force was not exonerated. Declining to
26 speculate, Koran instead stated that he would need to review his files. [See Koran Dep., at 206:21-
27 211:23.] From this, Plaintiff claims that “Koran testified that in the time he has been acting as
28 Supervisor of the Professional Standards Unit he has never issued a report that did not exonerate the
officer. Nor could he remember any such report ever being issued in his time with the department, and
he has been there since 1995.” [Pl.’s Opp’n, at 20-21.] Even if Plaintiff’s characterization of Koran’s
testimony were accurate, one officer’s failing to recall a report that found an officer’s use of force
excessive does not establish the existence of a municipal practice or policy.

1 1885769, at *17 (E.D. Cal. May 18, 2011) (negligence and battery “are measured by the same
2 reasonableness standard of the Fourth Amendment”); Munoz v. City of Union City, 120 Cal. App. 4th
3 1077, 1102 n.6 (2004) (“Federal civil rights claims of excessive force are the federal counterpart to
4 state battery . . . claims; in both, the plaintiff must prove the unreasonableness of the officer’s
5 conduct.”). Unlike § 1983 claims, however, qualified immunity does not insulate a police officer from
6 suit for claims under California law. Robinson v. Solano Cnty., 278 F.3d 1007, 1016 (9th Cir. 2002)
7 (en banc) (“California denies immunity to police officers who use excessive force in arresting a
8 suspect.”); Garcia v. City of Imperial, 2010 WL 3834020, at *14 (S.D. Cal. Sept. 28, 2010) (same).
9 California law “has [also] rejected the Monell rule and imposes liability on [cities] under the doctrine
10 of respondeat superior for acts of [city] employees.” Edgerly v. City and Cnty. of San Francisco, 599
11 F.3d 946, 961 (9th Cir. 2010) (quoting Robinson, 278 F.3d at 1016) (alterations in original)).

12 As discussed above, Defendants are not entitled to summary judgment that Officer Meritt’s use
13 of force was objectively reasonable. Thus, the motion for summary judgment on Carter’s battery claim
14 is **DENIED** as to both Officer Meritt and the City.

15 **B. Negligence**

16 Negligence claims stemming from allegations of excessive force by a police officer are also
17 analyzed under the Fourth Amendment’s reasonableness standard. Atkinson, 2011 WL 1885769, at
18 *17 (negligence and battery “are measured by the same reasonableness standard of the Fourth
19 Amendment”). Like state law claims for battery, § 1983 qualified immunity does not protect police
20 officers from suits for negligence under state law. Robinson, 278 F.3d at 1016. Thus, Officer Meritt is
21 not entitled to summary judgment on Carter’s negligence claim.

22 Regarding the City, however, Defendants argue California Government Code § 815(a) insulates
23 the City from liability for Officer Meritt’s negligence. Section 815(a) provides that, except as
24 provided by statute, “A public entity is not liable for an injury, whether such injury arises out of an act
25 or omission of the public entity or a public employee or any other person.” But this argument ignores
26 Government Code § 815.2, which makes clear that a public entity faces *respondeat superior* liability
27 for injuries caused by its employees, and is only immune from liability when the individual employee
28 is also immune. Cal. Gov. Code § 815.2; see also Robinson, 278 F.3d at 1016 (California law only
grants municipal immunity where the individual employee would also be immune); Scott v. Cnty. of

1 Los Angeles, 27 Cal. App. 4th 125, 139-40 (1994) (“Under Government Code section 815.2,
2 subdivision (a), the [City] is liable for acts and omissions of its employees under the doctrine of
3 respondeat superior to the same extent as a private employer. Under subdivision (b), *the [City] is*
4 *immune from liability if, and only if, [the employee] is immune.*” (emphasis in original)); White v.
5 Cnty. of Orange, 166 Cal. App. 3d 566, 570 (1985) (“in governmental tort cases, the rule is liability,
6 immunity is the exception”) (citation and internal quotation marks omitted). Because Officer Meritt is
7 not immune from Carter’s negligence claim, neither is the City.

8 Accordingly, the motion for summary judgment on Carter’s negligence claim is **DENIED** as to
9 both Defendants.

10 **C. California Civil Code § 52.1**

11 California Civil Code § 52.1 permits an individual to bring civil action for interference with his
12 rights under the United States or California Constitutions by threats, intimidation, or coercion.
13 Venegas v. Cnty. of Los Angeles, 153 Cal. App. 4th 1230, 1239 (2007). “Section 52.1 does not
14 provide any substantive protections; instead, it enables individuals to sue for damages as a result of
15 constitutional violations.” Reynolds v. Cnty. of San Diego, 84 F.3d 1162, 1170 (9th Cir. 1996),
16 *overruled on other grounds*, Acri v. Varian Assocs., Inc., 114 F.3d 999, 999-1000 (1997).

17 Carter’s claim under California Civil Code § 52.1 stems from his excessive force claim under
18 the Federal Constitution. Thus, it is also evaluated under the reasonableness standard of the Fourth
19 Amendment. See Jones v. Kmart Corp., 17 Cal. 4th 329, 331 (1998) (the elements of claims under
20 Cal. Civ. Code § 52.1 are essentially identical to claims under § 1983). Defendants argue, however,
21 that, unlike other claims under state law, if Officer Meritt is entitled to qualified immunity under
22 federal law, then both he and the City are also immune from suit under § 52.1. [Defs.’ MSJ, at 23.]

23 To support this argument, Defendants rely entirely on M.L. ex rel. Autry v. City & Cnty. of San
24 Francisco, 2006 WL 335386, at *7 (N.D. Cal. Feb. 13, 2006). The Court is aware of just one other
25 decision supporting Defendant’s position: Briley v. City of Hermosa Beach, 2008 WL 4443894, at *6
26 (C.D. Cal. Sept. 29, 2008). Both the Ninth Circuit and the California Court of Appeal, however, have
27 expressly held that qualified immunity under federal law does not apply to claims under California
28 Government Code § 52.1. Cousins v. Lockyer, 568 F.3d 1063, 1072 (9th Cir. 2009) (holding that
“California law is clear” that qualified immunity is a federal doctrine that does not apply to tort or civil

1 rights claims under state law); Venegas, 153 Cal. App. 4th at 1246 (“[Q]ualified immunity of the kind
2 applied to actions brought under 42 [U.S.C. § 1983] does not apply to actions brought under section
3 52.1.”).⁹

4 Thus, neither Officer Meritt nor the City is entitled to qualified immunity from Carter’s claim
5 under § 52.1. Defendants’ motion for summary judgment on this claim is **DENIED**.

6 **CONCLUSION**

7 For the reasons stated above, Defendants’ motion for summary judgment is **GRANTED IN**
8 **PART** and **DENIED IN PART**. The Court orders as follows:

9 Defendants’ motion for summary judgment that Defendant Scott Meritt’s use of force was
10 objectively reasonable is **DENIED**;

11 Defendants’ motion for summary judgment that Meritt is entitled to qualified immunity from
12 Plaintiff’s claim of excessive force under 42 U.S.C. § 1983 is **GRANTED**;

13 Defendants’ motion for summary judgment on Plaintiff’s claim against the City of Carlsbad for
14 failure to supervise under 42 U.S.C. § 1983 is **GRANTED**;

15 Defendants’ motion for summary judgment on Plaintiff’s claim against the City of Carlsbad for
16 failure to train under 42 U.S.C. § 1983 is **GRANTED**;

17 Defendants’ motion for summary judgment on Plaintiff’s claim under California law for battery
18 is **DENIED** as to both Defendants;

19 Defendants’ motion for summary judgment on Plaintiff’s claim under California law for
20 negligence is **DENIED** as to both Defendants; and

21 Defendants’ motion for summary judgment on Plaintiff’s claim under California Government
22 Code § 52.1 is **DENIED** as to both Defendants.

23 **IT IS SO ORDERED.**

24
25 **DATED:** 6/30/2011

26 
27 **IRMA E. GONZALEZ, Chief Judge**
28 **United States District Court**

⁹ Notably, the Ninth Circuit decided Cousins after Briley and Autry were decided, and thus impliedly overruled both on this point.